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IN THE

Supreme Court of the United States

October Term, 1969

No. 1382

WILLIAM C. DEAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner William C. Dean respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 28, 1969.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Central District of California appear in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 28, 1969. A timely petition for rehearing *en banc* was denied on January

1, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

Can the United States of America be said as a matter of law to have surrendered possession and control of a vessel as a whole to a contractor where, during the entire course of work, the ship remained a commissioned Naval ship, part of the Pacific Fleet, flying the appropriate flags and pennants, with its entire crew aboard, including the vessel's commanding officer, engaged in their usual activities while in port?

A. When the shipowner maintains the degree of control of the Vessel as a whole exercised herein, is the ship "in navigation" despite extensive repairs so that the owner warrants the vessel's seaworthiness to persons such as petitioner—a shore-based worker—injured on board?

B. Does such control of the vessel as a whole render the owner liable to petitioner for the negligence of the contractor if the shipowner knew, or should have known, of the dangerous conditions causing petitioner's accidents?

Statement of the Case.

William C. Dean, a shore-based coppersmith-pipefitter in the employ of Todd Shipyards, Inc., was injured in two separate accidents on board the USS TALUGA, a ship of the U.S. Navy, which was at the time afloat in navigable waters at the Todd Shipyards dock in Los Angeles Harbor. In his admiralty action against the

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United States of America Dean alleged causes of action for unseaworthiness and for negligence.

The USS TALUGA, a tanker used to refuel other ships at sea, was undergoing extensive repairs pursuant to a contract between Todd and the U.S. Navy. The cost of the work, which was covered by a "Regular Overhaul" Contract, totalled approximately $2,900,000.

Both accidents involved the use of the ship itself and its equipment. At the time of the first, Dean was bolting pipe in the bilge area. There was water in the bilge, his feet became wet, he climbed out onto a wet pipe and slipped and fell as a result of his foot and the pipe both being wet. In the second accident he was descending a steep ship's ladder and tripped on scaffolding erected by the contractor which projected through the rungs of the ladder. The trial court found that "as the term 'unseaworthy' is defined in law, each accident was a result of unseaworthiness. The water in the bilge and on the pipe rendered the ship unseaworthy as to accident #1. The scaffolding projecting through the rungs of the ladder rendered it unseaworthy as to accident #2." [Finding of Fact 17, Tr. 48].

The USS TALUGA had arrived in port from a sea voyage immediately prior to the commencement of the repair work and was scheduled to return to sea upon completion of the work. While undergoing the overhaul, the USS TALUGA at all times remained a commissioned ship of the U.S. Navy with its full complement of officers and crew, including the vessel's commanding officer, aboard. The Captain was at all times under the command of the Pacific Commander Service Group 1, and the ship was part of the Pacific

Fleet. The vessel was flying the U.S. Ensign and the Union Jack.

The crew every day patrolled every part of the ship. The "cold iron" watch made hourly inspection of the pump room in which both accidents occurred, measuring the water in the bilge and otherwise checking the structural integrity of the ship, and initialed a card kept in said pumproom. In connection with such inspection the crew used the ship's ladder from which Dean fell, the only means of access to said pump room.

The officers and crew observed colors morning and evening. Muster was conducted, ship's logs and notebooks were kept, and courts martial were held on board. The ship's crew was housed and fed aboard ship, and, in addition to their usual duties in port, performed certain maintenance and repair work during the period, which work was not called for by the contract with Todd.

The ship's force was responsible for the structural integrity of the vessel. The responsibility for preventing and controlling fire rested solely with the Captain. Todd's general superintendent testified [Tr. 403, lines 12-14]:

> ". . . (I)n the event of fire, we had a dual responsibility. And that responsibility lies solely with the captain of the vessel."

The engineering officer aboard the ship at the time of the accidents testified [Tr. 565]:

> "Wherever welding was going on we had a ship's force fire watch, and Todd Shipyards also had a worker who was supposedly acting in the capacity of a fire watch, and they were both armed with

CO_2 bottles in case of small rags burning, such as this.

Q. Did you have your fire watch aboard in the pump room at that time?

A. Wherever any welding was going on we had a fire watch."

The engineering officer also testified [Tr. 568, 573-574] that he had a security patrol that started at 1600 hours and patrolled all machinery spaces once every 45 minutes until 7:45 A.M., and on a 24-hour basis weekends and holidays, checking predominantly for flooding, fires, and unauthorized personnel.

Petitioner Dean contends, in view of these facts, that the owner maintained control of the vessel as a whole at all times.

The trial court found that Dean was performing work traditionally done by seamen, that each of his accidents was a result of unseaworthiness, but concluded that the USS TALUGA was a dead ship, or, if held to be in navigation, no duty of furnishing a seaworthy ship was imposed on the shipowner since the contractor had exclusive control of almost the entire area of the ship and exclusive control of the particular area in which the injury occurred.

The trial court further concluded that each accident resulted from the negligence of the contractor, and that the United States as owner had no duty to furnish Dean a safe place to work, and in particularity had no duty to pump water from the bilge or keep the pipe on which Dean stood free of water, and no duty to remove the scaffolding, or otherwise make safe the ladder in pump room #2.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of the West Case.

By applying *Berryhill v. Pacific Far East Line, Inc.*, 238 F. 2d 385 (9 Cir. 1956) in conjunction with *West v. United States*, 361 U.S. 118, 4 L. Ed. 2d 161, 80 S. Ct. 189 (1959) to the facts of the within action the Court of Appeals has misapplied *West* and the criteria set forth therein for determining whether there could be a warranty of seaworthiness or duty of care to any person under the circumstances.

The Court of Appeals decision herein adopts the following conclusion of the District Court:

> "During the period of the work . . . the USS Toluga (sic) was not a ship in navigation, but was, instead, a dead ship. In the case of a dead ship, no duty of furnishing a seaworthy ship is imposed on the ship owner."

In affirming the trial court, the Court of Appeals gave undue emphasis to the nature and extent of the repairs to the ship without giving proper consideration to the facts indicating the shipowner's control over the vessel. Control over the actual work which was delegated to Todd Shipyards, Inc. has been confused with control over the vessel as a whole.

The *Berryhill* case, *supra*, cited in the decision of the Court of Appeals, is a pre-*West* case and is silent on the issue of control. There, a harbor worker was in-

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jured while working on propulsion machinery of a vessel in dry dock. On page 387 the Court states:

> "The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends when the vessel is not on water."

And on the same page:

> "Here the repairs had nothing to do with loading or unloading the ship. The propulsion machinery of the vessel itself was being repaired. Not all repairs are 'ship's work', to be performed, historically or currently, by the crew."

In *Berryhill* recovery was denied to the harbor worker based on the nature and extent of the repairs. It is respectfully submitted that the Court below did the same in the within action and failed to properly interpret the mandate of this Court in *West*.

In *West, supra,* page 123, the Court states:

> "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship *or* the repairs . . ." (emphasis added).

However, the Court below has in fact concluded that since the owner did not have control over the repairs, it could not have control over the vessel. In the instant case the shipowner of course did not have control over the work performed by Todd, but it did have control over the vessel as a whole—a fully manned, commissioned ship of the U.S. Navy.

As a result of the application of *West* in conjunction with *Berryhill,* the decision in the within action conflicts with the decision of the Second Circuit in *Lawlor v. Socony-Vacuum Oil Company, Inc.,* 275 F. 2d 599 (2nd Cir. 1960) and of the Fifth Circuit in *Allen v. Union Barge Line Corp.,* 239 F. Supp. 1004 (E.D. La. 1965) 361 F. 2d 217 (5 Cir. 1966).

In *Lawlor, supra,* the vessel was laid up at a shipyard dock for her annual overhaul, with a full crew of officers and men aboard, performing seamen's duties, but with electric power and water being supplied from shore. The plaintiff, an employee of the shipyard, fell from a ladder belonging to and put in place by shipyard employees. In substance, the Court held that a vessel moored in navigable waters at a pier, undergoing its annual overhaul, warrants its seaworthiness to workmen such as plaintiff, imposing upon the owner the non-delegable duty to maintain the vessel and its equipment, including that brought aboard by the shipyard workers, in a safe and seaworthy condition.

In *Allen, supra,* the plaintiff employee of the contractor fell from a scaffold supplied by his employer while the ship was actually in drydock. Only part of the ship's crew was on board. Plaintiff was assisting with the removal of the propeller shafts at the time of his accident. The Court held that the unseaworthy condition was caused entirely by the negligence of the contractor but that considering all the elements, the plaintiff was entitled to the warranty of seaworthiness, citing *Lawlor.*

In *Allen, supra,* the Court states at page 1008:

> "To determine whether or not the warranty of seaworthiness is extended to a shore-based worker

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who performs labor on a ship which is not ready for a voyage but is docked in a private shipyard for repairs, overhaul, or maintenance, the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done rather than upon the specific type of work that each shore-based workman is doing on shipboard at the moment of injury. *West v. United States,* 361 U.S. 118, 80 S.Ct. 189, 4 L. Ed.2d 161 (1959). The character of the work to be done by the shipyard must be considered *as must the presence or absence of a crew performing the customary work of seamen on shipboard* and the consequent measure of control or lack of control by the shipyard over the vessel as a whole. *Lawlor v. Socony-Vacuum Oil Co.,* 275 F.2d 599, 84 A.L.R. 2d 613 (CA 2 1960) cert. den. 363 U.S. 844, 80 S.Ct. 1614, 4 L.Ed.2d 1728 (1960)." (emphasis added).

The ships in both *West* and in *Roper v. United States,* 368 U.S. 20, 7 L. Ed. 2d 1, 82 S. Ct. 5 (1961), which were held to be out of navigation, had no seamen on board. The ship in *Lawlor* had a full crew aboard, and the ship in *Allen* had part of its crew aboard performing its regular duties; in both of said cases the ships were held to be in navigation.

In the instant case, as heretofore stated, the full complement of officers and crew were aboard, performing their usual duties in port, participating in repairing the vessel, and exercising actual control over the vessel as a whole.

However, the Ninth Circuit in this case did not give weight to this consideration as was done by the Circuit

Courts in *Lawlor* and *Allen* in their interpretations of the application of the *West* decision, but rather looked backwards to *Berryhill.* It took the position that the extensive repairs were sufficient to take the USS TALUGA out of navigation and that the activities of the shipowner on board were irrelevant.

This is not a situation as in *West* where a few Navy personnel were placed on board the MARY AUSTIN solely to act as inspectors for the government, or as in *Roper* where the six men were not signed on as seamen. The crew of the USS TALUGA was performing the duties of seamen.

This is also not a situation, as in *West* and *Roper,* where the ship had been decommissioned or deactivated or was being used for storage purposes. The USS TALUGA was a ship of the Pacific Fleet undergoing a regular overhaul.

The Court below relied on and quoted from *Roper, supra,* in reaching its decision. However, there this Court pointed out that the ship was decommissioned, the men aboard were not signed on as seamen and then states at page 23:

> "In light of the above circumstances, we cannot say as a matter of law that the S.S. HARRY LANE had been converted into a vessel in navigation, and that the findings of the trial court were clearly erroneous."

In a footnote the Court states:

> "*Lawlor v. Socony-Vacuum Oil Co.,* 275 F.2d 599 (2nd Cir. 1960) is not contra. There minor repairs were underway on an active ship with a full crew aboard."

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The *Allen* case involved repairs to the propulsion equipment, as did *Berryhill,* and defective equipment belonging to the contractor, as did *Berryhill.* However, by properly applying the *West* test as elaborated on in *Lawlor,* the *Allen* case held that the ship was in navigation, contrary to *Berryhill.*

The Ninth Circuit in the instant case therefore has perpetuated this conflict by looking back to its old *Berryhill* decision which has been outdated by subsequent decisions of this Court, and where the Second and Fifth Circuits have properly interpreted and applied the law.

In *Lawlor* the Court states on pages 602-603:

> "Thus the critical question in this case is whether or not the fact that the Mobilfuel was moored in navigable waters at the pier of the shipyard during her annual overhaul gives her a status such that there is no warranty of seaworthiness and no duty to Lawlor to maintain the vessel and her equipment in a seaworthy condition.
>
> "Before we attempt to ascertain the underlying principle controlling the case and discuss the pertinent authorities, we think one or two observations will simplify the problem. *Thus we cannot see that the case would differ materially as a matter of basic reasoning if the injured man had been one of the crew of the vessel instead of an employee of Bethlehem. If Lawlor was doing the work traditionally done by seamen, as we have already found to be the case, he is in the same position as a member of the crew.* Moreover, we do not think resort to a mere phrase such as 'out of navigation'

gets us very far. Surely a vessel that has hit one of the submerged logs or other floating obstructions that plague our large harbors and has damaged her propellers so that she has to be towed to a shipyard for a day or two for repairs before continuing her voyage cannot fairly be said to have so changed her status as to eliminate any duty to the officers and crew on board to maintain the vessel and her equipment in a seaworthy condition until the repairs have been completed. Such a vessel is unable to move under her own power, she is still in navigable waters, and would seem to be no more 'out of navigation' at the pier of a shipyard than she would be if moored to one of the municipal piers, awaiting tugs to move her to a place where the repairs to her propellers could be promptly made. Thus, if being 'out of navigation' is a material factor, everything depends upon what we mean by 'out of navigation' in the context of the doctrine of unseaworthiness. If we were pressed to decide whether the Mobilfuel was 'out of navigation' in navigable waters moored at the Bethlehem pier, we would say she was not 'out of navigation.' " (Emphasis added).

What would have been the situation had a crew member of the USS TALUGA—rather than Dean—slipped on wet pipe while measuring the water in the bilge, or fallen from the ship's ladder while descending to inspect the pump room? Dean is in the same position as a member of the crew. Petitioner contends the shipowner warranted the vessel's seaworthiness to him.

As in all the cases herein cited, the contractor's negligence caused Dean's accidents. In the instant case,

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having concluded that the ship was surrendered to the contractor, the trial court further stated the shipowner had no duty to furnish Dean a safe place to work.

However, petitioner respectfully contends that facts not in dispute indicate that the shipowner at all times maintained control over the vessel as a whole and that the owner is therefore liable to Dean for the negligence of the contractor if it knew or should have known of the dangerous conditions (*Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 [1963]; *Albanese v. N.V. Nederl. Amerik Stoomv. Maats.*, 382 U.S. 283, 86 S. Ct. 429, 15 L. Ed. 2d 327 [1965]).

Petitioner contends the findings of the Courts below on the issue of control are clearly erroneous and therefore are reviewable by this Court. It is incomprehensible that the U.S. Navy could surrender control of a commissioned ship of the Pacific Fleet, complete with Captain and crew, to a contractor as ruled by the Courts below.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

MILAN MOACANIN,
Counsel for Petitioner.

March 30, 1970.

APPENDIX A.

Findings of Fact and Conclusions of Law on Issue of Liability.

United States District Court, Central District of California.

William C. Dean, Plaintiff, v. United States of America, Defendant. Civil #66-1561-IH.

Filed Jan. 8, 1968.

The above-entitled cause came before the Court for trial on November 2, 1967 on the issue of liability only, Milan Moacanin, Esq., appearing for Plaintiff and Schell & Delamer by Fred B. Belanger, Esq., appearing for Defendant, and witnesses and other evidence having been introduced by each side, and the Court having heard the testimony of witnesses and having considered such evidence and testimony and the records and files of the case, together with the memoranda of points and authorities and other documents filed by the parties, now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I

JURISDICTION AND FACTS SURROUNDING THE INJURIES SUFFERED BY PLAINTIFF

1. The Court has jurisdiction of this case under the admiralty laws of the United States. Plaintiff's claim is for personal injuries suffered while working aboard the USS Toluga, a vessel owned by the Defendant, which was at the time afloat in navigable waters and tied up to the dock of Todd Shipyards, Inc. in the harbor at Los Angeles, California.

2. At all times material to this case Plaintiff was a coppersmith-pipe fitter in the employ of Todd Shipyards, Inc. and was acting in the course and scope of his duties.

3. Plaintiff suffered injuries in two separate accidents in pump room #2 of the USS Toluga, the dates of such injuries being March 28 and March 29, 1966. The events of March 28, 1966 are hereinafter called "the first accident" and those of March 29, 1966 are hereinafter called "the second accident".

4. Immediately prior to the first accident, Plaintiff had been at work bolting a pipe joint in the bilge area. His work required him to position himself in a near-prone position with his back immediately on or near the deck of the bilge. Water was present on the deck of the bilge and in performing the work Plaintiff's feet were in the water. After finishing the work he was in the course of raising himself to an erect position. In so doing he put his foot on one of the pipes. As a result of his foot being wet and the pipe being wet, his foot slipped and he fell. While raising himself, he had a large wrench or wrenches in his hands. Plaintiff was wearing rubber-soled grooved boots. He had stood on the same pipe before without slipping.

5. Plaintiff had no reason to anticipate slipping and falling when he was raising himself to an erect position and was not guilty of contributory fault or negligence in connection with the first accident. The proximate cause of the first accident was the presence of water in the bilge and on the pipe in question.

6. The condition of the lighting in pump room #2 had no causative effect on the first accident.

7. Some of the water in the bilge which caused the first accident may have entered the bilge by rainfall through an opening in the main deck immediately above pump room #2. The said hole was cut by the contractor for the sole purpose of expediting contractor's work. The sole responsibility for cutting said hole in the deck and the sole control of said hole and the responsibility for covering it to prevent the entrance of rain, were that of the contractor.

8. Some of the water in the bilge which caused the first accident may have been water from fire extinguishers used by the contractor for extinguishing fires in the bilge area.

9. None of the water in the bilge area entered or remained as a result of any fault of the Defendant.

10. The second accident occurred while Plaintiff was descending a rather steep ladder. While descending he was carrying a heavy load of boxes of bolts weighing a total of approximately 40 pounds. These boxes, which were approximately 6 x 6 x 4 inches, were cradled in Plaintiff's arms, piled one on top of the other. Before commencing his descent of the ladder, he had carried this load about a quarter of a mile, stopping once to rest. Plaintiff descended the ladder face forward with his load of boxes in such a position that he could not see where his feet were going. He tripped on a piece of scaffolding which, some time before, had been erected by his fellow employees and which projected through the rungs of the ladder.

11. The second accident had two proximate causes, the scaffolding projecting through the ladder as aforesaid, and Plaintiff's failure to use due care in placing

and transporting the load as aforesaid, and in descending the ladder. The awkward and heavy load which he was carrying obscured his vision and, coupled with a sore back and leg from accident #1 the day before, and his inability to see where he was placing his feet, constituted lack of due care on Plaintiff's part and made it more likely that he would stumble and fall.

12. I assess Plaintiff's contributory fault at 50% as to accident #2.

13. Neither the condition of the lighting nor the condition of the rungs of the ladder had any causative effect as to accident #2.

14. There were railings present alongside the ladder at the place where Plaintiff stumbled and fell. These railings were unstable due to their having been previously cut. But the condition of the railings were not a proximate cause of, nor did such condition effect, accident #2. Plaintiff did not attempt to utilize the railings while descending. He was not grasping them. Thus their instability was not a cause of the fall. After the fall began, Plaintiff did not grab on to the railings while falling. Under the facts, even if the railings had been stable and sound, they would not have prevented or minimized the fall.

15. Viewing the totality of the work, the ship's crew could not possibly have performed work of this type and magnitude, either at sea or while the ship was at dock.

16. The work in which Plaintiff himself was engaged at the time of both accidents, i.e. bolting together pipes, was a type of work which can be, and traditionally is, done by seamen at sea. However sea-

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men at sea are not able to remove and rebolt pipe of the particular size, metal and dimensions that Plaintiff was working on. Seamen at sea are able to make emergency repairs on such pipe without removing and rebolting any section thereof. Where Plaintiff's employer is engaged in work of large scope, the type of work being done by the individual plaintiff is not an important factor. See *West v. United States,* 361 U.S. 118, 122 (1959).

17. As the term "unseaworthy" is defined in law, each accident was a result of unseaworthiness. The water in the bilge and on the pipe rendered the ship unseaworthy as to accident #1. The scaffolding projecting through the rungs of the ladder rendered it unseaworthy as to accident #2.

II

FACTS SURROUNDING THE STATUS, CONDITION AND CONTROL OF THE SHIP AND PARTICULARLY PUMP ROOM #2

18. The USS Tolgua is a United States Navy ship. On November 23, 1965, after arriving in port from a sea voyage, it entered drydock for the commencement of major work. The work was completed August 24, 1966. The vessel was scheduled to embark upon another sea voyage at the end of the work.

19. Plaintiff's employer, Todd Shipyards, Inc. was the general contractor for the work. The work cost approximately $2,900,000.00. The invitation to bid, the contract, and the specifications and drawings for the work cover several hundred pages.

20. Although the heading of the contract characterizes the work as a "General Overhaul", this is not an

accurate description. The work in fact consisted of a major overhaul and major reconstruction. The Toluga is a tanker used to carry petroleum fuels for supply to other ships, particularly aircraft carriers at sea. Included among the purposes of the work and within its scope was tearing down, inspecting and renovating substantially all of the important machinery on the vessel. Also included among the purposes and within the scope of the work was reconstruction of the pumping system so as substantially to increase the Toluga's oil pumping capacity. This involved a major revision of the pumping equipment and installation of new, better and larger pumps and pipes. On both occasions when he was injured Plaintiff was working on new pipes which were part of the said reconstruction and enlargement of pumping capacity.

21. The work required and resulted in the ripping out and removing from the ship the following: (1) All or substantially all of the ship's propulsion equipment, including all of the turbines, all main engines, all boilers and all or substantially all generators; (2) the entire steering system; (3) the main condensate pumps; (4) the bilge pumps; (5) all electronic gear and communications equipment including all radar. The work in pump room #2 involved ripping out all of the important machinery therein including the foundations for the machinery.

22. The ship left drydock on December 30, 1965, when it was refloated and was towed and tied up to a dock of the general contractor where it remained until

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the work was completed. In late March of 1966 when the two accidents happened, all of the above-mentioned machinery and equipment was still off the ship.

23. During the work and on the dates of the accidents, the ship had no power of its own. All power and other services including steam, water, communications, etc., were furnished to the ship from the shore. The ship was unable to move on its own power or even to steer itself if towed. It was essentially a hulk.

24. During the entire course of the work the ship remained a commissioned Navy ship with its crew, including the crew's commanding officer, aboard. The crew was housed and fed aboard and conducted musters and courtmartials aboard. The crew itself also performed certain maintenance and repair work during the period, which work was not called for in the contract with Todd Shipyards and which work did not overlap or interfere with the work of Todd under the contract.

25. Although the ship's crew retained some control of some limited areas of the ship, such as its living quarters, galley, and ward room, it had no control over the other areas of the ship which were within the exclusive control of the contractor. Among the areas within the contractor's exclusive control was pump room #2. That room was in the exclusive control of the contractor throughout the work period including before, on, and after March 28 and 29, 1966.

26. The Invitation to Bid which became part of the contract for the work (Ex. 14) provides in Article 5

for "delivery" of the vessel to the contractor at the commencement of the work and "redelivery" of it to the owner after completion of the work. The Master Contract (Ex. 14, p. 5, clause 5(g)) precludes and prohibits Navy and civilian personnel of the Government from interfering with the work. The Government, through civilian inspectors of the Navy Department, had the right to inspect the work.

27. The Government, neither through these inspectors nor through the crew or otherwise, exercised no control over the nature of the work, its method of performance, or the areas where the work was being performed which had been turned over to the exclusive control of the contractor as aforesaid.

28. During the work the crew maintained certain watches and inspections for the purpose of safeguarding the integrity of the vessel. Among these were a fire watch, and a so-called "cold iron watch". From time to time, crew members performing such duties entered the aforesaid spaces which were within the exclusive control of the contractor. The cold iron watch entered regularly into such spaces each day for the purpose of measuring the water in the bilge and otherwise to check the structural integrity of the ship. But these duties and entrances by the crew and the entrance by civilian inspectors did not constitute either partial or total exercise of control over the aforesaid contractor's areas, and particularly over pump room #2, and did not give the contractor less than total control of such areas.

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CONCLUSIONS OF LAW

1. During the period of the work, and particularly on March 28 and 29, 1966, the USS Toluga was not a ship in navigation, but was, instead, a dead ship. In the case of a dead ship, no duty of furnishing a seaworthy ship is imposed on the ship owner.

2. Even if, on the dates in question and during the repair work, the USS Toluga is held to be a ship in navigation, this factor alone does not result in duty of seaworthiness being owed this Plaintiff by the ship owner. Whether the duty is owed or not depends on several factors as outlined in *West v. United States,* 361 U.S. 118 (1959). Among the factors are the status of the ship, the pattern of repairs, and the extensive nature of the work contracted to be done. Weighing these factors, a determination must be made on the basis of fairness, i.e. whether it is fair to say that the owner holds the vessel out to the Plaintiff as a seaworthy vessel. Under the facts and circumstances of this case it would not be fair to impose such a liability. The contractor having exclusive control of almost the entire area of the ship and exclusive control of the particular area in which the injury occurred, it would not be fair to say that the ship owner assumed a duty to the contractor's employees to furnish a seaworthy vessel in those areas of the contractor's exclusive control.

3. Each accident resulted from negligence but in each instance it was exclusively the negligence of the contractor, Todd Shipyards, Inc. Under the facts and cir-

cumstances of the case, the United States as ship owner had no duty to the contractor's employees (and to Plaintiff among them) to furnish a safe place of work. In particularity the ship owner had no such duty in connection with the place of work and the cause of each accident. The ship owner had no duty to pump water from the bilge or keep the pipe on which Plaintiff stood free of water, and no duty to remove the scaffolding, or otherwise make safe, the ladder in pump room #2.

4. The pretrial order makes mention of an issue of imputation of the contractor's negligence to the United States as ship owner. This issue was not briefed and not argued. The claim of imputation will therefore be deemed to have been abandoned by Plaintiff. If any such issue remains in the case, no negligence of the contractor is imputed to the Defendant.

5. In his briefs and oral argument, Plaintiff relied on certain provisions in the Code of Federal Regulations concerning safety practices to be employed during the repair of ships. Under the circumstances of this case, the Defendant as ship owner had no duty to observe or enforce such standards and requirements in pump room #2. The United States had delegated such duty, if any it had, to the contractor as per clause 29, p. 20 of the Master Contract (Ex. 14).

6. Defendant is entitled to judgment. No determination is required as to the extent or monetary value of the injuries suffered by Plaintiff. No further trial of the damage issues is necessary.

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7. The result reached herein is in accord with the principles enunciated in the following cases:

West v. United States, 361 U.S. 118 (1959);

Berryhill v. Pac. Far East Lines, 238 F.2d 388 (9th Cir. 1956);

MacQuaid v. United States, 337 F.2d 483 (3d Cir. 1964);

Berge v. National Bulk Carriers Corp., 251 F. 2d 717 (2d Cir. 1958);

LaFranca v. United States, (1965) American Maritime Cases 2019 (S.D. N.Y. 1965);

Raidy v. United States, 153 F.Supp. 777 (D. Md. 1957);

Madden v. United States, 259 F.Supp. 663 (D. Mass. 1966).

Any Finding of Fact contained herein which is deemed to be a Conclusion of Law shall be so regarded, and similarly, any Conclusion of Law herein which is deemed to be a Finding of Fact shall be so regarded.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, this date, a copy of these Findings of Fact and Conclusions of Law, together with the copy of the Judgment entered pursuant hereto, on all parties to this action.

Dated: January 8, 1968.

/s/ Irving Hill
Irving Hill, Judge
United States District Court

Judgment.

United States District Court, Central District of California.

William C. Dean, Plaintiff, vs. United States of America, Defendant. Civil No. 66-1561-IH.

Filed Jan. 8, 1968.

The above entitled case came on for trial before the Court, the Honorable Irving Hill, Judge Presiding, commencing on November 2, 1967, on the issue of liability only, Milan Moacanin, Esq., appearing for plaintiff, and Schell & Delamer, Esqs., by Fred B. Belanger, Esq., appearing for defendant, and evidence both oral and documentary having been introduced, and the Court having considered the same and heard the arguments of counsel and being fully advised, and the Court having made and caused to be filed its written Findings of Fact and Conclusions of Law, it is ordered and adjudged:

1. That plaintiff has failed to prove the material allegations, on the issue of liability, set forth in his Complaint;

2. That defendant, United States of America, have judgment against plaintiff; and

3. That defendant, United States of America recover from plaintiff its costs of action herein.

Dated: January 8, 1968.

/s/
Irving Hill
United States District Judge

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APPENDIX B.

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

William C. Dean, Appellant, vs. United States of America, Appellee. No. 22817.

[November 28, 1969]

Appeal from the United States District Court for the Central District of California.

Before: JERTBERG, BROWNING, and ELY, Circuit Judges.

PER CURIAM:

Dean, plaintiff below and appellant here, was injured while aboard the USS Toluga, a Naval vessel owned by the United States. The injuries resulted from Dean's having slipped on two successive days, first on a pipe and the second time on a ladder, while working as an employee of Todd Shipyards, Inc. (Todd). Although the ship was afloat in navigable waters, it was tied to Todd's dock, undergoing extensive overhaul and reconstruction. Todd was performing the work under a contract which called for Government expenditure in the approximate sum of $2,900,000.

The accidents occurred in the vessel's Number 2 pump room, an area which, according to the District Court's determination, was under the exclusive control of Todd at all times relevant to the controversy.

In suing the Government, Dean alleged that the ship was unseaworthy and that the Government was

negligent. As to the latter contention the District Court found, in effect, that there was no negligence on the Government's part which contributed as a proximate cause of the accidents and Dean's resulting injuries. The finding is not clearly erroneous. There is abundant evidence to support it.

On the issue of unseaworthiness, the District Court's judgment in favor of the Government was based on the conclusion, among others, that "During the period of the work . . . the USS Toluga was not a ship in navigation, but was, instead, a dead ship. In the case of a dead ship, no duty of furnishing a seaworthy ship is imposed on the ship owner." We agree with this conclusion. The magnitude of the work, in cost, has been previously mentioned. The scope of the work, as well as ample support for the challenged conclusion, is further revealed by certain additional findings of the District Court, as follows:

> "21. The work required and resulted in the ripping out and removing from the ship the following: (1) All or substantially all of the ship's propulsion equipment, including all of the turbines, all main engines, all boilers and all or substantially all generators; (2) the entire steering system; (3) the main condensate pumps; (4) the bilge pumps; (5) all electronic gear and communications equipment including all radar. The work in pump room #2 involved ripping out of all the important machinery therein including the foundations for the machinery.
>
> "22. The ship left drydock on December 30, 1965, when it was refloated and was towed and tied up to a dock of the general contractor where

it remained until the work was completed. In late March of 1966 when the two accidents happened, all of the above-mentioned machinery and equipment was still off the ship.

"23. During the work and on the dates of the accidents, the ship had no power of its own. All power and other services including steam, water, communications, etc., were furnished to the ship from the shore. The ship was unable to move on its own power or even to steer itself if towed. It was essentially a hulk.

"24. During the entire course of the work the ship remained a commissioned Navy ship with its crew, including the crew's commanding officer, aboard. The crew was housed and fed aboard and conducted musters and courtmartials aboard. The crew itself also performed certain maintenance and repair work during the period, which work was not called for in the contract with Todd Shipyards and which work did not overlap or interfere with the work of Todd under the contract.

"25. Although the ship's crew retained some control of some limited areas of the ship, such as its living quarters, galley, and ward room, it had no control over the other areas of the ship which were within the exclusive control of the contractor. Among the areas within the contractor's exclusive control was pump room #2. That room was in the exclusive control of the contractor throughout the work period including before, on, and after March 28 and 29, 1966."

In the light of the foregoing findings and the evidence which supports them, no reasonable person could

have believed, at the times in question, that the Toluga was a ship "in navigation" so that the Government was then holding its vessel, or pump room No. 2 thereof, out to Dean or anyone else as "seaworthy." *See West v. United States,* 361 U.S. 118, 4 L. Ed. 2d 161, 80 Sup. Ct. 189 (1959). *See also Roper v. United States,* 368 U.S. 20, 7 L. Ed. 2d 1, 82 Sup. Ct. 5 (1961), wherein the Supreme Court held:

> "The test for determining whether a vessel is in navigation is the 'status of the ship.' This is a question of fact, and consequently reversible only upon a showing of clear error. . . .
>
> * * * *
>
> "Since we are unwilling to upset the trial court's factual determination that the S.S. *Harry Lane* was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness."

368 U.S. at 22-4 (citations omitted). *Compare Berryhill v. Pacific Far East Line,* 238 F.2d 385, 387 (9th Cir.), *cert. denied,* 354 U.S. 938, 1 L. Ed. 2d 1537, 77 Sup. Ct. 1400 (1957).

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1382

WILLIAM C. DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner Dean was a coppersmith-pipefitter employed by Todd Shipyards, Inc. While Todd was performing extensive overhaul and reconstruction work upon the U.S.S. TALUGA, a Navy vessel tied up at Todd's repair docks, petitioner suffered injuries from slipping twice while working in an area of the ship under Todd's exclusive control (Pet. App. 7, 15).

Petitioner sued the United States, alleging, *inter alia*, that his injuries had resulted from the failure

of the United States to maintain the TALUGA in a seaworthy condition. Applying *West* v. *United States*, 361 U.S. 118, the district court explicitly found, and the court of appeals agreed, that no warranty of seaworthiness was owed to petitioner because the TALUGA was a dead ship rather than a vessel in navigation. See *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85.

2. Whether a vessel was in navigation is, of course, a question of fact. *Roper* v. *United States*, 368 U.S. 20, 22-23. It follows, in light of the concurrent factual findings of the courts below, that the present case is not one appropriate for further review by this Court.

In any event, the rulings of the courts below were correct. In *West*, this Court held that a vessel was not in navigation where repairs being done on her amounted not to

> "ship's work" but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a repair contractor and docked at its pier for the sole purpose of making her seaworthy. It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case. * * * [361 U.S. at 122.]

Precisely the same situation existed aboard the TALUGA. At the time of the accident, the vessel was tied up at Todd's dock and Todd's employees had removed the turbines, the main engines, the boilers, substantially all of the generators, the entire steering system, the electronic and communications gear, the main condensate pumps, and the bilge pumps (Pet.

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App. 6). The ship had to draw electricity, steam, and water from the shore. All areas in which the renovation was proceeding were under Todd's complete control, and Navy and civilian government personnel were prohibited from interfering with Todd's work, although inspection was permitted. (Pet. App. 7, 8.)

The petitioner was injured in pump room #2, where the existing pumps and their foundations were being ripped out. His injuries were attributable to conditions existing as a result of the repair work. (Pet. App. 2-4.) As in *West*, it is obvious that the United States did not hold the vessel out to the petitioner as seaworthy.

The petitioner seeks to distinguish the present case from *West* because the TALUGA remained a commissioned vessel, her Navy crew was using her for living quarters, and Navy personnel inspected Todd's work (Pet. 7). But these facts did not restore the TALUGA into the active maritime service or transform her into a vessel in navigation. Cf. *Roper* v. *United States*, 368 U.S. 20. And in *West* this Court found it irrelevant that certain of the owner's employees were on board the ship "since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers." 361 U.S. at 123. Similarly, the fact that a number of the crew were living on the TALUGA is irrelevant since their presence had no connection with the repair work or with navigation of the vessel.

The petitioner also claims that the decision below conflicts with *Lawlor* v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599 (C.A. 2), and *Union Barge Line Corp.* v. *Allen*, 361 F. 2d 217 (C.A. 5). But those decisions were based on materially different factual findings as to the owner's control of the vessel or whether it was in navigation.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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